



# BULLETIN

Volume 7, Issue 4

June, 2001

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## Risk Management Division:

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## Risk Management Division Mission Statement

*To protect the assets of the State of North Dakota - its people, property, and financial resources - so that the State can continue to meet its obligations to its citizens.*

# Introducing the Risk Management Workers Compensation Program

**In** an effort to save premium dollars through a deductible program, and to establish a cross agency return-to-work program for the state of North Dakota, Section 29 of House Bill 1015 of the 2001 Legislature directed the establishment of a single workers compensation account to be administered by the Risk Management Division of the Office of Management and Budget. We are in the initial phases of establishing that program.

Section 29 of HB 1015 requires:

- ✓ Effective 7/1/02 all state entities covered by N.D.C.C. ch. 32-12.2 must participate in the Risk Management Workers Compensation Program unless exempted by the Director of OMB;
- ✓ The workers compensation premiums will be paid to the Risk Management Division rather than to North Dakota Workers Compensation (NDWC);
- ✓ The Risk Management Division will establish a fund with those monies to pay:
  - a) the deductible; and
  - b) the workers compensation premium to NDWC which has been reduced to reflect the newly established

- ✓ The development of a return -to-work program which may assign employees to agencies other than the employing agency at the time of the injury;
- ✓ To promulgate rules to govern the administration of the return-to-work program;
  - ✓ To report back to the Budget Section of the Legislative Council on the progress of the program; and
  - ✓ A review of the program by the Legislature during its next session because Section 29 sunsets on June 30, 2003.

*Something that won't change for State entities is that NDWC will continue to determine the level of compensation the injured worker and care provider are entitled to receive.*

Something that won't change for State entities is that NDWC will continue to determine the level of compensation the injured worker and care provider are entitled to receive.

The Risk Management Division is currently in the process of hiring someone to spearhead this program. We hope to have them on board around July 1. In addition, we have compiled a list of Workers Comp contacts for each agency. Look for regular updates on the program in future bulletins and via e-mail messages.

We appreciate your patience and assistance in getting this program up and running.

# How does a Lawsuit Evolve?

This is the second in a series of articles discussing litigation against State Employees. The first article (February, 2001 Bulletin) discussed the different scenarios in which State employees could be sued - in their "*individual or official capacity*" (acting within the scope of employment), or *personally* (acting outside the scope of their employment). This article will focus on the evolution of a lawsuit, the reason lawsuits are brought in State Court or Federal Court, and limits on liability.

**State Court Lawsuits.** Most lawsuits that allege a party was damaged or injured due to negligence on the part of a state employee are venued in a State District Court, usually in the County in which the incident occurred.

**Tort Caps.** Under the State's Tort Claims Act (N.D.C.C. ch. 32-12.2) the amount an injured party can collect from the State in a State Court action is limited to \$250,000, even if the party can prove or is awarded a judgment in excess of \$250,000. If more than four people are injured as the result of one occurrence, the total amount they are able to recover collectively is \$1,000,000. These caps apply to lawsuits that are venued in State Court cases and might not apply to lawsuits brought in Federal Court or in courts of other states.

**Notice Requirement.** Before someone can bring a lawsuit in State Court, they are required by the Tort Claims Act to give notice of their potential claim to the Director of OMB within 180 days after the injury or damage is discovered.

**The evolution of a lawsuit.** The first step in suing a state employee would be to serve the employee with a Summons and Complaint either by a process server or by mail. If you are served with legal papers in which you are sued for something you did as a State employee or a State volunteer:

- ✓ Immediately give written notice of the lawsuit to the head of your agency and

- the office of the Attorney General;
- ✓ Send the Attorney General copies of all of the documents you received;
- ✓ If you are served by mail, do not sign and return the Admission of Service. Instead forward it along with the other documents to the office of Attorney General for handling;
- ✓ Request indemnification and defense from the State by completing the "*Request for Legal Defense and Indemnification*" form which can be found on the Risk Management web site. ([www.state.nd.us/risk](http://www.state.nd.us/risk))

The Risk Management Fund will then hire an attorney to represent you. The first thing that attorney will decide is whether it is appropriate to file a motion with the Court requesting to have the lawsuit dismissed, or if it is more appropriate to file a document called an Answer on your behalf.

**Motion to Dismiss.** A Motion to Dismiss is filed if someone failed to file a 180 day notice with the Director of OMB, if an immunity exists (an exclusion from liability), or if the Complaint does not contain an allegation that could result in a finding of negligence against the State.

Under the State Tort Claims Act, as well in other sections of the North Dakota Century Code, there are a number of "exclusions to liability" for the State or State employees' acts. If the Complaint only contains allegations for which statutes provide there can be no liability on the part of the State or a State employee, the attorney will file a motion with the Court asking the Court to dismiss the action *as a matter of law*. If a Motion to Dismiss is successful, the lawsuit is over unless there is an appeal.

**Answer.** In those cases where a Motion to Dismiss is not appropriate, within 20 days of the State employee being served with the legal papers, the attorney will file an Answer with the Court responding to the allegations in the Complaint.



*Loss  
Control  
Tools*

## Documenting Effective Employee Training

The *Loss Control Tools* column of Vol. 7, Issue 3 of the February 2001 *Risk Management Bulletin* discussed the importance of establishing and implementing proper policies and procedures to address Sexual Harassment, Workplace Violence, Hostile Work Environment and Substance Abuse.

That article pointed out the importance of documenting that employees have been trained on these policies and procedures.

### *Of equal importance is documentation that:*

- 1) employees have been provided copies of the policies; and
- 2) obtaining the employee's acknowledgment that they have reviewed the documents and discussed the contents with their supervisor.

Accordingly, the Risk Management Division recommends that the following acknowledgment be incorporated into every employee's annual performance review.

### Employee Acknowledgement

I acknowledge that I have received a copy of the \_\_\_\_\_ (agency name) \_\_\_\_\_ policies and procedures regarding Sexual Harassment, Workplace Violence, Hostile Work Environment and Substance Abuse. My signature means that I have reviewed these documents and discussed the contents with my manager.

\_\_\_\_\_(Employee signature and date) \_\_\_\_\_

\*\*\*\*\*

### Hats Off!

We have noticed a significant improvement in the way the incident reports are being completed since the May Risk Management Seminar.

Thank you for your efforts to improve on your reporting process. *Keep up the good work.*

Your completing the form as thoroughly as possible assists us in processing the claim and eliminates the need for us to revisit the issue with you, sometimes more than once.

Note, one of the Manual inserts included with this Bulletin is the revised Incident Report Form (SFN 50508). We changed the form to reflect some of the suggestions made to us at the Seminar to assist you in getting the information to us that we need.

**Interrogatories.** After the Answer has been served, each party's attorney will probably send the other party Interrogatories - written questions that are to be answered under oath. The information contained in Interrogatories may be used during trial.

**Depositions.** The attorneys may then decide to take the deposition of a party, an expert, or a witness involved in the lawsuit. A Deposition is an oral statement made under oath, and the information obtained in a Deposition can be used during trial.

**Motion for Summary Judgment.** If, after the completion of the discovery process, the attorney representing the State and the State employee feels there is no indication of negligence on the part of the State, the attorney will file a Motion with the Court asking the Court to dismiss the Complaint and not allow the matter to proceed to trial. If the Court agrees that there is no basis for negligence, the matter will be dismissed.

**Settlement.** If, through the discovery process, it is discovered that there are issues that may lead a jury to determine some negligence on the part of the State or the State employee, settlement discussions would probably be held between the parties. If a settlement can be reached that both parties feel is fair, the matter will be dismissed by the Court. A settlement is not an admission of guilt. Often times it is just an agreement that benefits both parties.

**Trial.** If the matter cannot be settled between the parties, a trial is held and the verdict of the jury or, if tried to the Court, the judge resolves the matter.

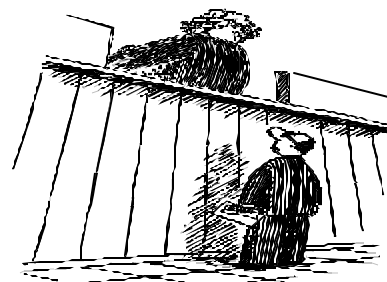
**Appeal.** If one of the parties involved in the lawsuit feels the trial court decision was not fair and in error, the matter could be appealed to the North Dakota Supreme Court. The decision of that Court is final.

**Federal Court Lawsuits.** The process of service of documents, motions, discovery, settlement negotiations, and trial are very similar to those in State Court. The main difference between the two systems is the type of lawsuits pursued in each.

In order to avoid the limit of recovery under the State Tort Claims Act, a party may decide to file an action in Federal Court. However, those lawsuits are limited because the Eleventh Amendment of the U.S.

Constitution prohibits lawsuits by individuals against the State (or State employees acting in their official capacity) in Federal Court. That is the reason we see many Federal actions brought against State employees in their individually capacity as well as their official capacity.

Common Federal Court lawsuits are those brought by employees against employers, supervisors, or fellow employees. They are referred to as Employment Practices Liability (EPL) cases. An allegation that a State employee violated someone's civil rights (discrimination, harassment) would probably be venued in Federal Court under federal statute 42 U.S.C. § 1983, commonly referred to as *section 1983*. This federal statute allows lawsuits against government representatives while acting on behalf of the government and, if successful, awards plaintiffs their attorney fees and costs.



Workplace discrimination cases are at an all time high and represent more than one-fifth of all Federal civil cases currently filed.

EPL cases represent 3% of the claims and lawsuits filed against the Risk Management Fund, but 15% of the dollars paid to settle claims or for the costs incurred to investigate and defend claims.

*This article is the second in a series of articles discussing litigation issues that State employees should be aware of in order to ensure they are provided all protections available to them. For more information on State employee defense see Section 8 of the Risk Management Manual.*

## Risk Management Division

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### CHECK IT OUT!!

Please check your address label.  
Report any corrections to our office.

## BULLETIN

### *Filing Workers Comp Claims On-line*

In order to eliminate the need to provide duplicate information about State entity workers compensation claims to Risk Management and NDWC, as of July 2, 2001, the Risk Management Division urges all State agencies to use the NDWC on-line electronic filing system. Employees and employers may now complete C1 and C2 forms electronically.



***It's Fast. It's Easy.***



### *Risk Management Manual Revisions*

Please make the following changes to your Risk Management Manual:

#### **Remove Pages:**

SFN 50508, following 3.5-1

5.0-1 thru 5.1-21

10.0-1 thru 10.0-13

#### **Replace with Pages:**

SFN 50508, following 3.5-1

5.0-1 thru 5.1-25

10.0-1 thru 10.0-11

### *Risk Management Division*

#### *Website Features*

Visit our website at [www.state.nd.us/risk/](http://www.state.nd.us/risk/) for standard and updated features including:

- ♦ Personnel e-mail and telephone directory
- ♦ Risk Management Manual
- ♦ Reporting Forms (following page 3.5-1 of the manual)
  - \* Incident Report (SFN 50508)
  - \* Notice of Claim (SFN 50552)
  - \* Motor Vehicle Accident Report (SFN 51301)
  - \* Destruction Hold Notice (SFN 52376)
- ♦ Facility Audit and Inspection Checklists (Page 4.3-1)
- ♦ Emergency and Disaster Procedures (Pages 4.5-1 through 4.6-5)
- ♦ Facility Use Agreement Form (Page 5.2-2)
- ♦ Waiver Forms (Pages 5.2-3 & 4)
- ♦ Risk Management Bulletins